

CLEMENTE A. LAZARO ET AL., PLAINTIFFS AND APPELLANTS, VS. FELICIANA MARIANO ET AL., DEFENDANTS. CARMEN JULIANA GARRICHO AND FRANCISCO AGUADO, APPELLEES.

G. R. No. 39433. March 09, 1934

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This is an appeal taken by the plaintiffs Clemente A. Lazaro and Maria Simon from the judgment rendered by the Court of First Instance of Nueva Ecija, with respect to the defendants' Carmen Juliana Garricho and Francisco Aguado, the dispositive part of which reads as follows:

"The court is of the opinion that it should decide and it hereby decides this case by declaring null and void, the deed Exhibit A, executed by the defendant Feliciano Mariano de Sarangaya and cancelling the original certificate of title No. 9303, in the name of the said defendant. The register of deeds of Nueva Ecija is hereby ordered to issue a certificate of title in the name of the plaintiffs, noting thereon, however, the mortgage liens evidenced by the deeds Exhibits B and C in favor of the defendants Carmen Juliana Garricho and Francisco Aguado, who are hereby absolved from the complaint.

"The indemnity prayed for by the plaintiffs in their complaint is hereby denied, with costs against the defendant Feliciano Mariano de Sarangaya. So ordered."

In support of their appeal, the appellants assign the following alleged errors as committed by the court a quo in its decision, to wit:

"1. The lower court erred in not finding that the annotation on original certificate of title No. 9303 of the order dated July 2, 1929, dismissing civil case No. 5073 was illegal, null and void, and could not be considered a cancellation of the notice of lis pendens for the reason that it was made on July 30, 1929, before said order had become final.

"2. The lower court likewise erred in not finding that the appellees acted in bad faith in executing the deeds of mortgage Exhibits B and C.

"3. The lower court also erred in not declaring said Exhibits B and C null and void with respect to the appellants.

"4. The lower court again erred in denying the motion for new trial filed by plaintiffs-appellants."

The following pertinent facts, which have been established at the trial by a preponderance of evidence, are necessary for the determination of the questions raised in this appeal, viz,:

On November 26, 1928, the herein plaintiffs-appellants Clemente A. Lazaro and Maria Simon filed a complaint, docketed as civil case No. 5073 of the Court of First Instance of Nueva Ecija, against the herein defendant Feliciano Mariano (alias Feliciano Mariano Vda. de Sarangaya, and Feliciano Mariano Sarangaya), praying upon the facts alleged therein, that the contract of sale Exhibit A be declared rescinded and that an order be issued

directing the cancellation of certificate of title No. 9303 of the registry of deeds of Nueva Ecija and the issuance of another in lieu thereof in the name of the said plaintiffs-appellants.

On the said date of November 26, 1928, at 11.03 a. m., 8 notice of lis pendens was filed in the office of the register of deeds of Nueva Ecija, which notice was noted on the back of said certificate of title No. 9303.

On July 2, 1929, the aforementioned civil case No. 5073T was called for hearing. Inasmuch as the plaintiffs failed to appear and their counsel was not ready for trial, the court, upon petition of the defendant's counsel, dismissed the case (Exhibit I-C).

On July 27, 1929, the plaintiffs filed a motion for reinstatement (Exhibit I-E), which was denied in an order dated September 11, 1929 (Exhibit I-F).

On July 30, 1929, the order of dismissal dated July 2, 1929, was noted on the back of said certificate of title No. 9303.

On September 23, 1929, Feliciano Mariano, the defendant in the aforesaid civil case No. 5073, constituted two mortgages on the parcel of land described in the aforementioned certificate of title No. 9303, in favor of the herein defendants-appellees Carmen Juliana Garricho and Francisco Aguado: the first mortgage for the sum of P10,000 (Exhibit B) and the second for P 6,500 (Exhibit C).

The first question to be decided in this appeal, which is raised in the first assignment of error, is whether or not the notation of the order of dismissal of civil case No. 5073 on the back of the certificate of title No. 9303 is legal and valid and operated as a cancellation of the notation of the notice of lis pendens.

As will be seen from the statement of facts above given, the dismissal of the complaint in civil case No. 5073 was due to the failure of the therein plaintiffs, who are also the plaintiffs in this case, to appear before the court when the said case was called for trial on the date set therefor, and to their counsel's statement made in open court that he was not ready to proceed with the case. Section 127, case 2, of the Code of Civil Procedure, provides that the court may dismiss an action when the plaintiff fails to appear at the time of trial, and the defendant appears and asks for the dismissal; in which case the said dismissal shall not be a bar to another action for the same cause (section 581, California Code of Civil Procedure). By provision of law, such dismissal does not therefore give to the subject matter so dismissed, the character of res judicata and consequently the order of dismissal does not finally determine the controversy and is not appealable, in accordance with the provisions of section 123 of the same Code. The order dismissing a case upon petition of the defendant by reason of the plaintiff's failure to appear, not being appealable, the provisions of the Code of Civil Procedure relative to the period for, and the steps to be followed in, the filing and perfection of an appeal are not applicable, and the plaintiff has no other remedy but to ask for the reinstatement of the case or to file another complaint upon the same cause. Upon failure to resort to either remedy, there will be no pending case before the court, which may be noted in the registry of deeds.

The notation of the order of dismissal issued in civil case No. 5073, which eliminated it from the court's docket, operated as a cancellation of the notation of the pendency thereof (38 Corpus Juris, p. 40, sec. 65). At any rate, due to the delay in the filing of the new complaint, which was done on June 10, 1930, the dismissal having taken place on July 2, 1929, the herein plaintiffs-appellants lost the benefit of the lis pendens (38 Corpus Juris, p. 40, sec. 66).

The other assignments of error, being mere corollaries of the first assignment, need not be passed upon, inasmuch as the questions involved therein have already been implicitly determined by the resolution of the legal question raised in the aforesaid first assignment of error.

In view of the foregoing, this court is of the opinion and so holds: (1) That the order dismissing a civil case, upon petition of the defendant by reason of the plaintiffs failure to appear, is not final and does not constitute res judicata, and therefore, not appealable; and (2) that the dismissal of a civil case upon petition of the defendant by reason of the plaintiff's failure to appear, operates as a cancellation of the notation of lis pendens.

Wherefore, not finding any error in the appealed judgment, it is hereby affirmed in toto, with costs against the appellants. So ordered.

Malcolm, Hull, Imperial, and Goddard, JJ., concur.

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